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90-1649

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No.

FERNANDO ROJAS,

Petitioner,

- vs -

ALEXANDER'S DEPARTMENT STORE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a private corporation sued pursuant to 42 U.S.C. §1983 is immune from *respondeat superior* responsibility and protected by the same requirements imposed by *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1984), on a plaintiff suing a governmental entity, since, private corporations have no "policy" or "custom" in the same sense as governmental entities.

2. Whether a light dark-skinned hispanic plaintiff suing under 42 U.S.C. §1983 alleging discrimination on account of his skin color when he was unlawfully arrested in defendant's retail store, has been deprived of Due Process of Law where the jury was not permitted to consider his skin color in their deliberations about whether there was such discrimination.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Fernando Rojas prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Order of the District Court is unreported. It is reproduced with an amendment thereto dated December 19, 1990, in Appendix A to this Petition at A-1. The opinion of the District Court is reported at 654 F. Supp. 856 and is reproduced in Appendix B to this Petition at A-12.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (Appendix C at A-18) was entered on November 29, 1990. A timely petition for rehearing with a suggestion of rehearing en banc was filed. It was denied on January 28, 1991 (Appendix D at A-20). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case was brought under Title 42 U.S.C. § 1983 which appears in Appendix E at A-22. Also involved is the Fourteenth Amendment and the Fifteenth Amendment to the Constitution of the United States. Pertinent parts of those Amendments appear in Appendix E at A-22-23.

STATEMENT OF THE CASE

The complaint alleged that plaintiff was deprived of his constitutional rights by defendant department store arising out of an unlawful arrest and criminal prosecution for petit larceny and possession of stolen property which occurred while plaintiff was shopping inside the store. The plaintiff, an hispanic of colored complexion, had asserted and then showed at trial in support of his contention, that the defendant was engaged in state action, that his arrest was made by a store employee deputized as a New York City policeperson.

It was alleged in the complaint and evidence was adduced at trial that a store detective in taking the plaintiff into custody while he was stopped inside the store openly carrying an answering machine he intended to purchase, acted with the store police employee, pursuant to a policy of the store of arresting persons of color, such as blacks and hispanics, on suspicion of theft. The plaintiff further alleged and proved at trial that he had been acquitted of the criminal charges after a trial in the state court.

Judgment below was entered against the defendant in the district court after a jury trial where the jury had found, in response to an interrogatory verdict, that the plaintiff had been arrested without probable cause, but that, under the terms of the trial court's instruction, it was unable to find that defendant's employee had arrested plaintiff in accordance with a policy of arresting "hispanics," as distinguished from other persons of color. The trial court specifically instructed the jury that a private corporation was subject to the same rules as a public governmental entity sued under 42 U.S.C. § 1983, under Monell v. Department of Social Services, 436 U.S. 658 (1987) – i.e. the doctrine of respondeat superior which imposes vicarious liability on an employer for the acts of its employees does not apply to a municipality, unless the

employee is specifically authorized to carry out a policy of the employer which would deny a third party his/her civil rights. The court below held that the defendant private corporation would be liable to plaintiff only if the employee who arrested him was acting pursuant to a policy of the employer to discriminate against hispanic customers.

Further, in the court's instructions to the jury, the court specifically refused to include the issue of whether the discrimination charged involved the color of petitioner's skin, i.e., that the issue before them was whether the defendant had a policy of arresting blacks and hispanics as part of the claim that it had an illegal racial policy of arresting persons of color on suspicion of theft. Instead, under the court's instructions, the jury was confined in its deliberations to a narrow issue, whether the store discriminated against hispanics only, despite evidence adduced without objection otherwise, that 70% of the defendant's arrests for theft were of blacks and hispanics and where plaintiff's skin color permitted an inference that he could be classified as a person in either or both categories. The racial, color and ethnic percentage breakdown indicated that roughly 50% of the arrests were of "blacks" and roughly 20 % were of hispanics.

REASONS FOR GRANTING THE PETITION

I

This Court Should Review and Decide Whether the Doctrine of Respondeat Superior Should be Applied in an Action under 42 U.S.C. §1983 Where the Defendant is a Private Corporation and not a Municipality or Governmental Entity.

A. Petitioner Contends Here that it Was Error for the Court Below to Affirm the Trial Court's Rejection of the Liability of the Private Corporate Defendant for the Acts of its Employee, Acting in the Scope of his

Employment which Denied Petitioner a Constitutional Right.

The issues before this Court as presented in the decision below have never been directly addressed by this Court. In Monell v. Social Services of the City of New York, supra, this Court held that a municipality cannot be held liable under 42 U.S. C. §1983 for the wrongdoing of its employees (who deprive a plaintiff of a constitutional right) unless it can be shown that the employee's actions were the result of his/her following a policy established by the municipality or a custom followed by that municipality.

The ruling in Monell has been upheld in other cases by this Court which has reiterated the rule that the 42nd Congress that passed §1983 did not intend to hold local governmental bodies under a theory of respondeat superior for their employees' violations of third person's constitutional rights. See St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. Cincinnati, 475 U.S. 469 (1986); Jett v. Dallas Ind. School District, ___ U.S. ___ 105 L.Ed. 2d 598 (1989).

In Jett this Court discussed the issue at great length as to whether, under 42 U.S.C. §1981, a public agency was bound by the anti-respondeat superior doctrine applicable to cases under § 1983. In discussing this issue of when a local governmental entity is liable for acts of its employees, this Court focused on (1) which officials state law identified as policy-making officials; (2) over which issues they may have policy-making authority; (3) did their decision cause the injury complained of; (4) whether custom or usage "having the force of law" was a factor. 105 L.Ed. 2d at 627,628.

The court below, in establishing this new doctrine that a private corporation had no vicarious liability for the acts of its employees, did not consider how these issues could be applied when a private corporation acts to deprive a person of his/her constitutional rights. It also did not consider the basic issue that, as dis-

tinguished from a public agency, a private corporation does not identify "policymakers" as a matter of state law, nor is it bound by either policy or custom. Under the common law in effect at the time the 42nd Congress passed the law, a private corporation acted through all its employees, who could impose liability upon a corporation through acts taken within the scope of their employment. There was no such thing as a "custom" officially followed by any corporation in legal lore.

The ruling below now extends the doctrine of Monell to private corporations exercising state action as required to establish liability under §1983, and is contrary to dicta and ruling in Adickes v. Kress, 398 U.S. 144, 151-152 (1970).

This Court has recently reaffirmed a finding of the liability of a private corporation on the grounds of respondeat superior for punitive damages based on Alabama's perception of its common law in Pacific Mutual Life Insurance Co. v. Haslip, ___U.S.___, 59 U.S.L.W. 4157 (decided March 4, 1991).

This Court has never applied the Monell doctrine to a private corporation. The Monell Court said:

> "[T]hat language [Section 1983] cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." (436 U.S. at 692) (emphasis supplied).

Prior to Monell and in 1970, this Court decided Adickes v. Kress, 398 U.S. 144, 151, 152, (1970). Without specifically having this issue before it, the Court held:

> "Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way to compel or

> encourage racial segregation. Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under Section 1983 if she can prove that a Kress employee, in the course of employment and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store or to cause her subsequent arrest because she was a white person in the company of Negroes." (emphasis supplied).

Justice Harlan for the Court went even further in his analysis against the position of the court below. He said:

> "The involvement of a state official in ...a conspiracy [with a private party] plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights whether or not the actions of the police were officially authorized or lawful....Moreover a private party involved in such a conspiracy, even though not an official of the State can be liable under Section 1983." (id. at 152) (emphasis supplied).

This decision certainly implies that a private corporation may be held liable under circumstances in which a governmental body has immunity if it exercises state action through the use of a police agency by conspiracy or prior agreement or by hiring an employee empowered to arrest, as in the instant case. Here the private corporation, Alexander's Department Store, secured police empowerment by City legislative action so that its employee could make valid arrests for theft of persons shopping in its department store.

The reasoning which supports the municipal immunity (as opposed to a private corporation) from

the doctrine of respondeat superior goes back to the argument that Congress intended the preclusion of municipal liability in cases where the city or governmental agency was not at fault. Liablity would be established if the plaintiff could show that the municipal entity was at fault because a policy or custom of the agency subjected the plaintiff to the damage he/she incurred. This reasoning does not and could not apply to a private corporation, as known to the common law of that time and the 42nd Congress. A corporation does not have a custom or policy -- it acts through its employees and is responsible for the actions of its employees.

Considerations which involve governmental immunities for governmental actions in certain categories, (i.e. prosecutorial, judicial and legislative immunities) do not apply to private actors. The concern that local taxpayers and the polity as a whole should not be responsible for the errant acts of a low level official does not apply when a private corporation is involved. Public policy must be the rationale for the non-respondeat superior doctrine of Monell which argument would have no application to a private person or corporation. Cf. Briscoe v. Lahue 460 U.S. 325, 343 (1983).

Other circuit courts have held that private persons (and a private corporation is such a person), may not assert qualified immunity. See Duncan v. Peck, 844 F. 2d 1261 (6th Cir. 1988); F.E. Trotter v. Watkins, 869 F. 2d 1312 (9th Cir. 1988) [private party may not assert qualified immunity in a Bivens action]; Downs v. Santelle, 574 F. 2d 1 (1st Cir. 1978) [private party not entitled to raise good faith defense].

The cases above discuss the legislative intent of the 42nd Congress which passed the original Section 1983 and read into its provisions the common law which included the doctrine of sovereign immunity which was later extended to include immunity for government officials. The concept of respondeat superior for private

employers was already established in the accepted law or the common law of 1871.

In 1878, this Court defined in Orleans v. Platt, 99 U.S. 676, 682 (1878), how that accepted common law applied respondeat superior to private corporations. viz.:

> "A corporation is liable for the acts of its servant while engaged in the business of their employment to the same extent that individuals are liable under like circumstances."

Cf. Restatement, Agency § 219; Pacific Mutual Life Insurance Co. v. Haslip, supra.

Monell overruled Monroe v. Papp, 365 U.S. 167 (1961) which had established for purposes of a Section 1983 action that a municipality had its common law sovereign immunity. It did so, however, on the narrowest grounds, requiring for liability to be established that the employee of such municipality be shown to be following a constitutionally illegal policy of that municipality.

The immunity cases cited above recite that there is no common law history of immunity for private individuals.Public policy justifications for the doctrine of official immunity i.e. the injustice of hobbling a public officer's discretion and the danger that the threat of liability would interfere with a public servant's execution of duties for the public good, do not exist for either private persons or private corporations. The court below nonetheless invoked Monell to state that:

> "private employers are not liable under Section 1983 for the constitutional torts of their employees... unless the plaintiff proves that 'action pursuant to official....policy of some nature caused the constitutional tort." A-5

The trial court in the case at bar stated it was not deciding this issue, and cited a district court opinion in Wisconsin which was contra. See Classon v. Shopko Stores, Inc., 435 F. Supp. 1186 (E.D. Wis. 1977). That court also listed three other Circuit Courts of Appeal in the 4th, 7th and 10th Circuits which ruled that the Monell doctrine was applicable to private corporations. See A-20,21. The trial court submitted the issue to the jury as though Monell applied to private corporations, and as though Adickes had never been decided by this Court or that the evidence was not "sufficient to show that defendant's other store detectives conspired with the special patrolman in the actions taken against Fernando Rojas. See, e.g. Dennis v. Sparks, 449 U.S. 24, 27-28 & n. 4 (1980) ("[p]rivate persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of Section 1983 actions") (A-50) cf. Adickes, supra.

As distinguished from Adickes, the "special patrol[person]" here was a woman hired by Alexander's to make official arrests and to exert state action in the course of making such arrests.

It was this arrest that the jury below found to be without probable cause. But for the erroneous application of Monell, petitioner would have had a plaintiff's verdict from the jury.

II

The Ruling of the Court Below Denied Petitioner His Right to Have the Jury Consider Whether In Fact the Defendant Store Discriminated Against Him on the Grounds of His Skin Color Where He Was Categorized as Hispanic, but his Skin Color was Dark and he Asserted Discrimination on Grounds of "Black or Hispanic."

The further issue is raised where petitioner claimed he was illegally discriminated against by a private corporation and illegally arrested because of his

non-white color of skin. Petitioner was denied his due process right of claiming discrimination because of the trial court's refusal, affirmed by the court below, to permit the jury to consider his dark skin color as the basis for his claimed discrimination as required under the Fourteenth and Fifteenth Amendments to the Constitution. Petitioner claimed discrimination on account of that skin color. According to a report on the front page of the New York Times for March 11, 1991, the 1990 Census classifies hispanics as either "black or white" and there is no consistent or unified race attached to the classification of "hispanic."

Section 1983 was passed originally in 1871 to assure and give remedies to black citizens who were victims of Klu Klux Clan outrages and to assure their rights under the recently passed Fourteenth Amendment. Monroe v. Pape, 365 U.S. 167, 174 (1961). Section 1983 provides in this respect that no state and therefore no state action can deprive a citizen of the privileges and immunities of citizens of the United States. The Fifteenth Amendment, written with the Fourteenth Amendment in mind, secures voting rights to all citizens and in the process states that the rights of citizens to vote shall not be denied "on account of race [or] color..."

The drafter of the original § 1983 bill, Representative Shellabarger, made clear in the House debates that the considerations which went into the language of the Fifteenth Amendment were equally applicable to § 1983, viz.: "That section [civil rights act of 1866] provides a criminal proceeding in identically the same case as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act have been on account of race, color or former slavery." (emphasis supplied) Cong. Globe, 42 Cong. 1st Sess, App 68 (1871), cited in Jett, supra, at 105 L.Ed.2d 619.

In the case at bar, the petitioner pleaded that the defendant corporation had deprived him of his rights as

a citizen because of its policy concerning "blacks and hispanics" which meant because of his color.

In falsely arresting him for shoplifting, petitioner contended that the defendant corporation was "following a policy of ...special surveillance of minority race persons such as blacks or persons of Spanish extraction." This allegation in the complaint, specifically raised the issue of discrimination against him on account of "race [or] color."

The trial court in a pre-trial ruling had held that "[t]his allegation, if true, would suffice to meet the requirements that a plaintiff show that official policy is the moving force behind the constitutional violation ... Plaintiff Rojas is entitled to an opportunity at trial to prove the existence of such a policy." (A-12-13)

At trial, however, the court reversed itself and refused to put to the jury the issue as to whether the defendant followed a policy which discriminated against persons of a different color i.e. blacks and hispanics. Instead, the trial court confined the jury to considering whether the defendant had a policy of discriminating only against hispanics. Thus after the court told counsel to the parties pretrial that the issue in the case was whether the defendant had a policy of discrimination against blacks and hispanics and that this issue would go to the jury, that court, for no apparent reason and capriciously, changed its mind and refused to put the issue to the jury by proper instruction. The court below did not discuss this issue.

This change of theory by the trial court played havoc with the theory of plaintiff's case and permitted the jury to ignore the overwhelming evidence that indeed the defendant did have a policy of discriminating against blacks and hispanics as shown by its arrest records kept in the usual course of business. These records, admitted in evidence without objection, showed that Alexander's Department store, commencing in 1981, kept records marking the race and color of its

arrestees, and that those records showed that persons arrested by the store's employees for shoplifting were more than 70 per cent blacks and hispanics, categorizing persons arbitrarily, in either category each of which could involve a different color of skin. The categories of blacks and hispanics combined involved a 70 % arrest rate with less than 30 per cent categorized "whites" arrested for shoplifting. The largest arrest group, however, (50%) involved the color "black," into which category census surveys recognize fall a large number of hispanics.

The court below ignored the unchallenged allegations of the complaint on which issue had been joined as did the trial court and sidestepped and obscured this issue in its opinion by misstating the issue and eliminating petitioner's claim of error concerning skin color. viz., "Rojas also contends that he was entitled to a jury instruction and a special interrogatory that asked the jury whether the defendant had a policy of discriminating against "minorities" instead of merely against hispanics." (A-2)

By so erroneously posing the issue, using the word "minorities" instead of color of skin, the court below obscured and fudged the real issue completely. Minorities are defined in the law as not only persons of different races and color, but also women [42 USC § 2000e et seq.]. Plaintiff did not urge any gender discrimination below. Plaintiff's pleadings and the trial court's apparent understanding of them prior to trial, used the word "minorities" only as qualified by race and color.

When plaintiff's counsel was permitted to argue to the jury in summation that defendant had a policy of giving special surveillance to blacks and hispanics as shown by the records of an aggregate black and hispanic arrest rate of 70%, defendant's counsel countered in his summation, pointing to the plaintiff, that Mr. Rojas was not obviously hispanic or black; he could be an "Indian" (Hindu) or an "Egyptian," he said. These are both ethnic

categories characterized by a darker color of skin from caucasian (white). In so arguing, defendant's counsel underlined the issue of skin "color."

This Court has before it in 1991 the constitutional issue underlined in the Fifteenth Amendment as to whether a discrimination charged against a defendant on account of "color" of skin can be changed and limited by court instruction where race and color discrimination have been raised as an issue, to a meaningless broad ethnic description of hispanics or minorities.

CONCLUSION

This Court should grant the writ to decide whether respondeat superior applies to private corporations sued under 42 U.S.C. §1983, and further whether the Fourteenth and Fifteenth Amendments require a Court to instruct a jury in a discrimination case on color of skin as well as ethnic background where specifically requested.

Dated: April 20, 1991

Respectfully submitted,

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APPENDICES

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 91—August Term 1990

Argued: September 13, 1990

Decided: November 29, 1990

Docket No. 90-7306

FERNANDO ROJAS,

Plaintiff-Appellant,

—against—

ALEXANDER'S DEPARTMENT STORE, INC.,

Defendant-Appellee.

Before:

LUMBARD, WINTER, and MINER,

Circuit Judges.

Appeal from judgment entered in the Eastern District of New York, Nickerson, *J.*, for Alexander's Department Store, Inc. after a jury verdict in its favor in a suit by Fernando Rojas under § 1983 alleging illegal discrimination for his arrest for shoplifting without probable

cause, pursuant to a policy of discrimination against Hispanics.

Affirmed.

ELEANOR JACKSON PIEL, New York, N.Y., *for Plaintiff-Appellant.*

DENNIS M. WADE, New York, N.Y. (White, Fleischner & Fino, New York, N.Y., of counsel), *for Defendant-Appellee.*

LUMBARD, *Circuit Judge:*

Fernando Rojas appeals from a judgment for Alexander's Department Store, Inc. in the Eastern District of New York, Nickerson, *Judge*, after a jury returned a verdict in favor of Alexander's. Rojas sued under 42 U.S.C. § 1983 (1988) alleging that his constitutional rights had been violated when a security guard from Alexander's arrested him without probable cause for shoplifting. In response to two special interrogatories, the jury found that although there was no probable cause to arrest Rojas, Alexander's did not have a discriminatory policy targeting Hispanics for arrest.

Rojas argues that because the jury found that Alexander's did not have probable cause to arrest him, he was entitled to damages under § 1983. Rojas also contends that he was entitled to a jury instruction and a special interrogatory that asked the jury whether the defendant had a policy of discriminating against "minorities"

instead of merely against Hispanics. Finally, appellant claims it was reversible error to admit evidence that other New York City department stores kept records that designated the race or ethnic background of persons arrested for petit larceny. We agree with the rulings of the district court and affirm the judgment.

On November 9, 1984, Rojas, while waiting for his wife, went into the Alexander's Department Store on Queens Boulevard in Rego Park, New York City. He purchased an answering machine in the electronics department and left to pick up his wife. Rojas and his wife then returned to Alexander's to buy a second answering machine as a gift. While Rojas's wife waited for him on another level of the store, Rojas went to the electronics department where he took another answering machine from a display. According to Rojas's testimony, the closest cash register had a long line so he went looking for another register. Jerry Diaz, a security guard for Alexander's, testified that Rojas passed six registers before making his way to the department store exit. Rojas testified that he saw a display of women's blouses close to the exit. Rojas claims that he then approached a security guard at the exit to ask if he could purchase both the answering machine and a blouse at the same register. Before he could question the security guard, Rojas was arrested by Diaz. According to his own admission on cross-examination, Rojas was three feet from the exit door when he was arrested.

Rojas was led to an office where he was searched and handcuffed. Witnesses for Alexander's stated that Rojas was treated with respect. Rojas agreed with this assessment except he contends that at one point he was called a "spic" or "spic mother fucker". Alexander's' wit-

nesses denied this assertion. Rojas was held for a period of about two hours before he was released.

Alexander's employed a Special Police Officer,[1] Iris Luck. Luck recorded Rojas's arrest in her employer's records, signed the summons and read the *Miranda* warnings to Rojas prior to his questioning. Rojas was subsequently tried and acquitted on charges of petit larceny and criminal possession of stolen property. He thereafter brought this action.

Judge Nickerson put two special interrogatories to the jury. First, the jury was to determine whether the store had probable cause to arrest Rojas. The jury answered no. The second interrogatory asked the jury to decide whether Alexander's had "a policy, custom or usage to discriminate against Hispanic customers on account of their race or national origin by subjecting them to increased suspicion and baseless arrest for shoplifting." The jury also answered this question in the negative.

Effect of the Jury's Determination that Alexander's Lacked Probable Cause

Rojas contends that because the jury found that Diaz lacked probable cause to arrest him for shoplifting, he was entitled to damages under 42 U.S.C. § 1983 for violation of his fourth amendment right not to be seized absent probable cause. We reject this argument.

To state a claim for relief under § 1983, a plaintiff must allege both a violation of a right secured by the Constitution or by federal law, and that the alleged dep-

1 Pursuant to New York Administrative Code § 434a-7.0, shopkeepers may obtain the special deputization of an employee for the purpose of arresting customers believed to be shoplifting.

rivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) *overruled in part, on other grounds Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The second prong of the standard is not at issue in this case as Alexander's does not dispute the district court's ruling that its employment of Luck as a Special Police Officer satisfied § 1983's "under color of" state law requirement.

Rojas is not suing Luck, the arresting, "quasi-public" officer, and Luck's employer, Alexander's, is not responsible for the illegal arrest under the tort theory of *respondeat superior* in suits brought under § 1983. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981). Private employers are not liable under § 1983 for the constitutional torts of their employees, *see Iskander v. Village of Forest Park*, 690 F.2d 126, 128-29 (7th Cir. 1982); *Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir. 1982); *Draeger v. Grand Central, Inc.*, 504 F.2d 142, 145-46 (10th Cir. 1974), unless the plaintiff proves that "action pursuant to official . . . *policy* of some nature caused a constitutional tort." *Monell v. Dep't of Social Serv. of the City of New York*, 436 U.S. 658, 691 (1978) (emphasis added). *See also* Weeks, *Personal Liability Under Federal Law: Major Developments Since Monell*, in Section 1983: Sword and Shield, 295, 299 (Reilich and Carlisle ed. 1983). Although *Monell* dealt with municipal employers, its rationale has been extended to private businesses. *See, e.g. Iskander, supra*, at 128-29; *Powell, supra*, at 506; *Smith v. Brookshire Bros.*, 519 F.2d 93, 94 (5th Cir. 1975) (per curiam) (the mere fact that the store manager may have made a mistake in detaining customers suspected of shoplifting does

not, by itself, make the store owner liable to customers for damages); *Draeger*, *supra*, at 145-46.

Thus, to recover under § 1983, it is not enough for Rojas to show that his arrest by Luck was without probable cause. He must show that Alexander's had a policy of arresting shoplifting suspects on less than probable cause. The mere fact that the jury determined in the first interrogatory that there was no probable cause to arrest the plaintiff is insufficient to warrant a judgment against Alexander's because the jury found that Alexander's did not have a policy of arresting Hispanic shoplifting suspects on less than probable cause.

Alleged Errors in the Jury Instruction

In its jury charge, the district court, over Rojas's objection, directed the jury to determine whether Alexander's had a policy of discrimination against "Hispanics" instead of "minorities". The second special interrogatory also used the term "Hispanics", and not "minorities":

> Did Alexander's have a policy, custom or usage to discriminate against Hispanic customers on account of their race or national origin by subjecting them to increased suspicion and baseless arrest for shoplifting?

Plaintiff takes issue with the charge and the second special interrogatory, and argues that the jury should have been asked to decide whether the defendant had a policy of discriminating against "minorities", as requested by Rojas. Rojas also contends that the district court gave erroneous instructions with regard to § 1983's standard for employer liability.

We first address the contention that the district erred by using the term "Hispanic" as opposed to "minorities". The only direct evidence of discrimination in this case was Rojas's disputed testimony that he was called a "spic" or a "spic mother fucker" while being held by Alexander's' security guards. There was no direct evidence of discrimination against minority groups other than Hispanics.

In a city with the racial, ethnic and religious diversity of New York, defining the term minorities may prove an elusive task. By employing "Hispanics" in the jury instruction and special interrogatory, the district court made it clear that it was referring to a group that has traditionally been considered victimized by discrimination; a condition of which the jury must have been fully aware.

Rojas was allowed to introduce circumstantial evidence of discrimination against minorities in the form of the arrest records maintained by Alexander's. His counsel was also permitted, over the defendant's objection, to argue in summation that Alexander's had a policy of discriminating against minorities. We find no reason to believe that the jury was misled, prejudiced or confused by Judge Nickerson's charge. *See Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 511 (5th Cir. 1980); *Crador v. Lousiana Dep't of Highways*, 625 F.2d 1227, 1230 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Cicinato v. McPheeters*, 542 F.2d 634, 636 (4th Cir. 1976). It was not error for the court to refuse a charge employing the term "minorities" instead of "Hispanics".

Regarding the liability of Alexander's as an employer, Judge Nickerson first charged that, "[t]he employee

must also be responsible for establishing policy regarding such activity before Alexander's can be held liable." Rojas's counsel objected to the charge, prompting Judge Nickerson to make the following correction:

> However, the policy can be set by another employee or by the higher ups in Alexander's and the fact that higher up employee (sic) has discretion in the exercise of his responsibility, if he is a policy making person, which does establish a policy, but a particular person just because he makes the arrest, in this case Mr. Diaz, if he is not the person responsible for making the policy it's not because he has discretion and responsibility for establishing the policy.

Thus, the court properly instructed the jury that the discriminatory policy leading to employer liability need not have been created by the employee implementing that policy. This correction sufficiently instructed the jury on the standard to be applied.

Relevance of Arrest Records of Comparable Department Stores

At trial, the plaintiff introduced the arrest records of Alexander's which, among other things, recorded the race of the arrestee. Alexander's then offered the arrest records of Macy's and Gimbel's, which also noted the race of arrestees. Rojas claims that the arrest records of other department stores were irrelevant, and their admission was not harmless error.

We believe the admission of arrest records of other comparable department stores was proper. It was relevant evidence which provided an alternative explanation

for recording the race of the arrestees: that Alexander's was merely following industry custom. Such evidence served to rebut Rojas's attempt to have the jury infer that the maintenance of records of the race of the arrestees showed that Alexander's discriminated against minorities, including Hispanics. Admission of the Macy's and Gimbel's arrest records made it "less probable" that Alexander's had a policy of discrimination. Fed. R. Evid. 401. It was for the jury to decide whether the maintenance of such records was evidence of a policy of racial discrimination or simply a means of refreshing the recollection of the security guards regarding any particular incident. We hold that the Macy's and Gimbel's arrest records were admissible.

Affirmed.

APPENDIX A (CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 90-7306

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of December, one thousand nine hundred and ninety.

PRESENT: HONORABLE J. EDWARD LUMBARD
HONORABLE RALPH K. WINTER
ROGER J. MINER

----------X

FERNANDO ROJAS,

Plaintiff-Appellant,

-against-

ALEXANDER'S DEPARTMENT STORE, INC.,

Defendant-Appellee.

----------X

ORDER

IT IS HEREBY ORDERED that the opinion in this case, decided on November 29, 1990 be amended as follows:

Delete on page 516, lines 1 through 19 and all of page 517 and insert the following:

Relevance of Testimony of Arrest Records of Comparable Department Stores

At trial, the plaintiff introduced the arrest records of Alexander's which, among other things, recorded the race of the arrestee. Alexander's then offered testimony that the arrest records of Macy's, Gimbel's, Bloomingdales and other department stores also noted the race of arrestees. Rojas claims that this testimony was irrelevant, and its admission was not harmless error.

We believe the admission of the testimony of the record keeping practice of comparable department stores was proper. It was relevant evidence which provided an alternative explanation for recording the race of the arrestees: that Alexander's was merely following industry custom. Such evidence served to rebut Rojas's attempt to have the jury infer that the maintenance of records of the race of the arrestees showed that Alexander's discriminated against minorities, including Hispanics. Admission of the testimony of record keeping practices of comparable department stores made it "less probable" that Alexander's had a policy of discrimination. Fed. R. Evid. 401. It was for the jury to decide whether the maintenance of such records was evidence of a policy of racial discrimination or simply a means of refreshing the recollection of the security guards regarding any particular incident. We hold that the testimony of the record keeping practices of comparable department stores was admissible.

Affirmed.

SO ORDERED.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk

APPENDIX B

MEMORANDUM AND ORDER

DOCKET NO. CV-86-0956

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

FERNANDO ROJAS and PETRUCIA ROJAS,

Plaintiffs,

-against-

ALEXANDER'S DEPARTMENT STORE, INC.,

Defendant.

----------X

ELEANOR JACKSON PIEL, ESQ.
New York, New York
for plaintiffs

WHITE, FLEISCHNER & FINO
(John Mulcahy, Esq., of counsel)
New York, New York
for defendant

NICKERSON, District Judge

Plaintiffs brought this action under 42 U.S.C. Section 1983 alleging that defendant through agents acting as police officers wrongfully arrested plaintiff Fernando Rojas in the presence of plaintiff Petrucia Rojas, all in violation of their constitutional rights.

Defendant Alexander's Department Store (Alexander's) moves for an order (a) dismissing the complaint for lack of subject matter jurisdiction and for failure to state a claim, (b) dismissing the claims insofar as they allege state claims of false arrest and false imprisonment as barred by N.Y. Civ. Prac. Law section 215(3) requiring such actions to be commenced within a year, and (c) dismissing the claim of Petrucia Rojas because she lacks standing to make the claim.

Alexander's submits affidavits in support of the motion. Plaintiffs submit an affidavit in opposition to the motion and also move for leave to file an amended complaint adding a claim that Alexander's discriminated against plaintiffs because they are of "South American (Spanish)" extraction. The court treats Alexander's motion as one for summary judgment pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

From the affidavits the following facts emerge. Plaintiffs were in Alexander's Department Store on November 9, 1984. Fernando Rojas, with a telephone answering machine in his hand, was stopped and detained by store detectives employed by Alexander's. According to plaintiffs, Petrucia Rojas was in another part of the store waiting for Fernando, her husband. When he did not appear she searched him out and found him handcuffed in the security office, causing her embarrassment and anxiety. After a few hours he was released from custody and given a summons to appear and answer to charges of petit larceny and possession of stolen property. Almost a year later he was acquitted on the charge. Plaintiffs filed this suit on March 25, 1986.

Defendant claims that the store detectives who arrested and held Fernando Rojas were private citizens and not officials, and that therefore defendant did not act under color of state law. Moreover, defendant asserts that it cannot be held vicariously liable under section 1983 for the acts of its employees.

Although the detective who held Fernando Rojas, handcuffed him and told him he was under arrest was paid by Alexander's, she was also apparently a "special patrolman" appointed by the New York City Police Commissioner pursuant to the New York City Administrative Code section 434a-7.0. The summons was signed by her as "SPO" (Special Police Officer) and specified her shield number.

Under the Administrative Code such a special patrolman "shall...possess all the powers and discharge all the duties of the [police] force, applicable to regular patrolmen." Such a special patrolman, with the power to arrest, is a government official subject to section 1983 liability. Cf. Williams v. United States, 341 U.S. 97 (1951).

Alexander's potential liability under section 1983 for having employed the detective is a more difficult issue. Although it is not clear whether the arresting detective was commissioned as a special patrolman at Alexander's behest (one of several procedures available under section 434a-7.0 of the Administrative Code), the court is of the view that, in any event, the decision to employ a "special patrolman" involves a utilization for Alexander's benefit of state law enforcement authority sufficient to satisfy section 1983's "under color" of state law requirement. See, e.g., Thompson v. McCoy, 425 F. Supp. 407, 410 (D.S.C. 1976). In addition, the complaint can be construed as setting forth facts sufficient to show that defendant's other store detectives conspired with the special patrolman in the actions taken against Fernando Rojas. See, e.g., Dennis v. Sparks, 449 U.S. 24, 27-28 & n. 4 (1980) ("[p]rivate persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of section 1983 actions").

Absent a conspiracy, however, there remains an issue whether Alexander's can be held vicariously liable for its employee's actions. Most courts that have addressed this point have held that a corporate

employer is not liable under section 1983, on a theory of respondeat superior, for the constitutional torts of its employees. See, e.g., Iskander v. Village of Forest Park, 690 F.2d 126, 128-29 (7th Cir. 1982); Powell v. Shopco Laurel Co., 678 F.2d 504 (4th Cir. 1982); Draeger v. Grand Central, Inc., 504 F.2d 142, 145-46 (10th Cir. 1974); Ibarra v. Las Vegas Metropolitan Police Department, 572 F. Supp. 562 (D. Nev. 1983); Shepard v. Byrd, 581 F. Supp. 1374, 1389-90 (N.D. Ga. 1984); Estate of Iodice v. Gimbels, Inc., 416 F. Supp. 1054 (E.D.N.Y. 1976). But see Classon v. Shopko Stores, Inc., 435 F. Supp. 1186 (E.D. Wis. 1977). The majority viewpoint relies heavily on the line of cases that culminated in the Supreme Court's decision in Monell v. Department of Social Services, 436 U.S. 658 (1978), and which held that "a municipality cannot be held liable under section 1983 on a respondeat superior theory." Id. at 691. Neither the Supreme Court nor the Second Circuit appear to have addressed directly the issue of whether a private corporate employer may be held liable under section 1983 on a respondeat superior theory.

This court does not decide this issue. Even if the doctrine of respondeat superior does not apply to section 1983 actions at all, plaintiffs, particularly in their papers in support of their motion to amend the complaint, have alleged that it was defendant's unstated policy to arrest more readily on suspicion of shoplifting those customers who were black or hispanic. This allegation, if true, would suffice to meet the requirements that a plaintiff show that official policy is the moving force behind the constitutional violation. See Polk County v. Dodson, 454 U.S. 312, 326 (1981). Plaintiff Fernando Rojas is entitled to an opportunity at trial to prove the existence of such a policy.

Moreover, to the extent that Fernando Rojas has alleged a conspiracy between Alexander's other private employees and the special patrolman, a sufficient basis for Alexander's potential liability exists. See, e.g., Adickes v. S. H. Kress and Co., 398 U.S. 144 (1970).

Plaintiffs' remaining contentions are more easily addressed. While any pendent state law claims for false arrest and false imprisonment are indeed barred by N.Y. Civ. Prac. Law section 215(3), establishing a one year statute of limitations, see Conway v. Village of Mount Kisco, 750 F.2d 205 (2d Cir. 1984), plaintiffs' federal claim under section 1983 is governed by the three year statute N.Y. Civ. Prac. Law section 214(2), see Pauk v. Board of Trustees, 654 F.2d 856 (2d Cir. 1981), cert. denied, 455 U.S. 1000 (82), and is here timely brought. The court declines to view Wilson v. Garcia, 471 U.S. 261 (1985) as overruling Pauk unless and until the Second Circuit adopts that position. See, e.g., Green v. Coughlin, 633 F. Supp. 1166 (S.D.N.Y. 1986).

Petrucia Rojas has constitutional standing to sue because she has alleged a direct injury to herself, namely, the emotional distress when she saw her husband detained and handcuffed. See Warth v. Seldin, 422 U.S. 490 (1975). However, the fact that she alleges injury does not establish that she has stated a claim under section 1983. "The first inquiry in any section 1983 suit...is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws [of the United States.]'" Baker v. McCollan, 443 U.S. 137, 140 (1979) (quoting 42 U.S.C. section 1983). She may have alleged facts showing a state law tort claim of intentional or negligent infliction of emotional distress. But she has not pointed to any deprivation of her federally protected rights. Absent conduct that "shocks the conscience," see Rochin v. California, 342 U.S. 165, 172 (1952), a claim for damages due to emotional distress does not state a cognizable section 1983 cause of action. See, e.g., Grandstaff v. City of Borger, 767 F.2d 161, 172 (5th Cir. 1985); Sullivan v. Marshall, 628 F. Supp. 1080, 1083 (D. Mass. 1985); Horne v. Farrell, 560 F. Supp. 219, 225 (M.D. Pa. 1983).

Her state law tort claims for the infliction of emotional distress may not be litigated here. Pendent party jurisdiction is unavailable. See Leopold v. Birkett, 523 F. Supp. 525 (E.D.N.Y. 1981). See also Sullivan,

supra, 628 F. Supp. at 1083-84; Fritts v. Niehouse, 604 F. Supp. 823, 827-30 (W.D. Mo. 1984); Stanley v. City of New York, 587 F. Supp. 393, 397 (E.D.N.Y. 1984).

The motion to dismiss the claims of Petrucia Rojas is granted. The motion to dismiss the claims of Fernando Rojas insofar as they allege state torts of false arrest and false imprisonment is granted. Defendant's motion to dismiss the complaint otherwise is denied. Plaintiffs' motion for leave to serve an amended complaint to allege discrimination is granted only with respect to Fernando Rojas. So ordered.

Dated: Brooklyn, New York
December 30, 1986

Eugene H. Nickerson, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 90-7306

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29 day of November one thousand nine hundred and ninety

Present: HON. J. EDWARD LUMBARD,
HON. RALPH K. WINTER,
HON. ROJER J. MINER,

Circuit Judges,

FERNANDO ROJAS,

Plaintiff-Appellant,

v

ALEXANDER'S DEPARTMENT STORE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk

by: Edward J. Guardaro,
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DOCKET NO. 90-7306

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and ninety-one.

FERNANDO ROJAS,

Plaintiff-Appellant,

v.

ALEXANDER'S DEPARTMENT STORE, INC.,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant, Fernando Rojas.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

APPENDIX E

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom or usuage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

...

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FIFTEENTH AMENDMENT

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropiate legislation.